No. 14833

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH GLEN MADSEN,

Appellant,

vs.

HAROLD H. HINSHAW, Sheriff of Skagit County, Washington; WILLIAM B. PARSONS, United States Marshal for the Western District of Washington; and Honorable HERBERT BROWNELL, Attorney General of the United States,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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SUBJECT INDEX

TABLE OF CASES

STATUTES

TABLE OF DIGESTS AND TEXTBOOKS

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BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

This action was brought in the District Court for the Western District of Washington under 28 U.S.C. 2241. Appellate jurisdiction lies in this court under 28 U.S.C. 2253.

II. STATUTE INVOLVED

28 U.S.C. 2255 (62 Stat. 967, as amended by 63 Stat. 105) states, in part, as follows:

> "A prisoner in custody under sentence of a court *established by Act of Congress* [italics portion substituted for 62 Stat. 967 which read "* * * of the United States. * * *"] claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the [sentencing] court to vacate, set aside or correct the sentence.
>
> * * * *
>
> An appeal may be taken to the court of appeals from the order * * * as from a final judgment on * * * habeas corpus.
>
> * * * *
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the [sentencing] court * * * or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

III. QUESTIONS PRESENTED

1. Did the District Court for the Western District of Washington ever rule on the merits of appellant's petition?

2. Do the quoted portions of 28 U.S.C. 2255 require appellant to pursue his remedial action in the District Court for the District of Alaska and simultaneously deprive the District Court for the Western District of Washington of 28 U.S.C. 2241 jurisdiction?

3. Is the entire matter moot?

IV. STATEMENT OF THE CASE

Pursuant to Rule 18-3 of this court, appellee waives controversion of appellant's statement of the case.

V. SPECIFICATION OF ERROR

Appellee, at the outset, feels that the issue must be clearly delineated. Appellant states (Tr. 10, line 24) "After considering the same [appellant's petition] on the merits, the * * * Court * * * erred in dismissing * * * Petition. * * *" Appellee contends that the District Court never passed on the merits and the sole appellate question ~~in~~ is jurisdiction.

VI. SUMMARY OF ARGUMENT

Much of appellant's brief, specifically grounds V (Brief, p. 26, VI (Brief, p. 27), VII (Brief, p. 35), VIII (Brief, p. 37), IX (Brief, p. 39) and X (Brief, p. 40) deal with the merits of appellant's petition

which were never considered by the District Court. Many of the cases cited and arguments made would, no doubt, be pertinent were this appeal on the merits. However, it is not.

Appellant's grounds I (Brief, p. 11), II (Brief, p. 12), III (Brief, p. 20), IV (Brief, p. 25) and XII (Brief, p. 43) might be called "procedural" aspects of habeas corpus and would doubtless be pertinent were this appeal on the merits. However, it is not.

Appellee contends that appellant's ground XI (Brief, p. 42) does not correctly state the law and that the cases cited do not support the proposition stated. Appellee further contends that such statement, were it the law, would apply only to an appeal on the merits which is not before the court.

Appellee contends that 28 U.S.C. 2255 does apply to the District Court for the District of Alaska and that such court was created by an Act of Congress (Appellant's Brief, ground XIII, p. 44).

Appellee contends that 28 U.S.C. 2255 has not been shown inadequate or ineffective and hence 28 U.S.C. 2241 can have no application.

Appellee contends that the entire issue is now moot inasmuch as appellant is beyond the jurisdiction; the parties to the action no longer control the appel-

lant's custody; and the issue of Judge Folta's alleged prejudice has vanished with his death.

VII. ARGUMENT

A. *The Appeal Before the Court Is on Jurisdictional Grounds—Not on the Merits.*

The District Court did state (Tr. 96, line 22) "* * * it appears advisable to consider said motion and amended petition *on its merits*" [italics supplied] but the words must be read in context. The District Court had first said (Tr. 86, line 11) "The sole issue before the Court is one of jurisdiction * * *" and had ruled (Tr. 92, line 1) "* * * this court does not have jurisdiction."

The District Court, when passing on the amended petition, said (Tr. 96, line 22), "* * * The amended petition contains no additional allegations of fact that * * * give this court *jurisdiction* [italics supplied] and the [previous] decision [denying jurisdiction] * * * is affirmed.

Clearly the use of the word "merits" by the District Court was to indicate a re-examination of the *jurisdictional* claim as distinguished from summary disposition of the matter as *res judicata;* the District Court never considered the matter on the merits; and the only appellate question is jurisdictional.

B. *Appeal on Jurisdiction Does Not Permit a Review de novo on the Merits.*

Since there has been no District Court decision on the merits, a review *de novo* on the merits would be an anomaly. However, from appellant's ground XI (Brief, p. 42) it is not entirely clear to appellee what is sought from the Court of Appeals.

Appellant cannot be seeking an original writ of habeas corpus from the Court of Appeals for that court will not issue one. *Moore v. Smith* (C.A., 9th; 1947) 164 F. 2d 483.

Appellant cannot be seeking a writ of habeas corpus from "* * * any circuit judge within [his] * * * jurisdiction" under 28 U.S.C. 2241. This is an appellate, not an original proceeding. See *Bowen v. Johnston* (D.C. Cal., 1944) 55 F. Supp. 340.

Cases cited in support of appellant's desire to have the Court of Appeals decide the matter *de novo* do not appear to be in point. This is an appeal from a District Court's decision that it had no jurisdiction; not a decision on the merits.

Specifically, the *Endo*, *Hawk*, *Ellis* and *Denno* cases were reviews on the merits from denials on the merits by lower courts and are not in point here.

The *Quirin* case cited by appellant in support of his proposition for a review on the merits here is the only one remotely in point. In that case a District Judge *(Ex parte Quirin,* (D.C., Dist. Col., 1942) 47 F. Supp. 431) had denied a petition for habeas corpus on the ground that petitioners were not privileged to seek the same, being excluded from U. S. courts by Presidential proclamation. In that respect, it resembles this case in that jurisdiction — not merit — was denied. The Supreme Court did go extensively into the merits of the matter but it must be remembered that the German saboteurs were *sui generis.* It must also be remembered that (317 U.S. at 18) the Supreme Court was actually considering in parallel an application for leave to file an original petition in the Supreme Court and a review of the adverse decision of the District Court. A peculiar state of facts was thereby presented. This case cannot be cited as authority for review on the merits of a denial of the writ on alleged lack of jurisdiction. Appellee knows of no case, nor has he been cited to any, holding that a refusal to hear on jurisdictional grounds may be appealed on the merits.

C. *28 U.S.C. 2255 Does Apply to the District Court for the District of Alaska and Such Court was Created by Act of Congress.*

Appellant states in his Section XIII (Brief, p. 44) that 28 U.S.C. 2255 does not apply to the court in which the defendant was tried or to the crime for which defendant stands committed. Appellee feels that appellant errs in his conclusion and in the premises upon which it is based.

First degree murder was neither created nor defined by the Alaska legislature. That was done by the Act of March 3, 1899 (30 Stat. 1253) which enacted a criminal code and one of criminal procedure for Alaska. Similarly, the District Court was not created by the Alaskan legislature, but by the Act of June 6, 1900 (31 Stat. 321 at 322; 48 U.S.C. 101). Both statutes are printed in ACL (65-4-1 and 53-1-1, respectively) but this is by virtue of Chapter 28, Alaskan Laws of 1947 (ACL, Vol. I, p. xi) which provides for the compilation, *inter alia*, of "* * * the laws of the United States exclusively applicable to this Territory * * *" — *not* because they are acts of the territorial legislature.

Appellee is willing to concede appellant's statements (Brief p. 45) that the Alaskan territorial legislature has reasonably broad legislative powers and

that territorial statutes, although identical in form are not acts of Congress. However, appellant's arguments are not in point. Appellee points out the distinction between Acts of Congress in effect in Alaska and laws passed by the Territorial Legislature, See *U. S. v. Wigger*, 235 U.S. 276, 35 S.Ct. 42, 59 L.Ed. 226 (1914). The simple fact in this case is that the Alaska legislature has neither passed any law concerning murder nor has it created the District Court.

That so-called Alaskan habeas corpus noted on page 45 of appellant's brief is not the same as 28 U.S.C. 2241 *et seq* cannot be gainsaid for plainly the language differs. But, Alaskan habeas corpus is not a creation of the Alaska legislature having been established by the Act of June 6, 1900 (31 Stat. 321 at 423). ACL Nos. 66-26-20 to ACL 66-26-22 inclusive have been interpolated between Sections 584-585 of the statute by Chapter 64 of the Alaska session laws of 1925 and such source is plainly indicated in the historical notes in ACLA. The remainder is and remains the original Congressional enactment. Whether the Alaskan legislature *could* pass a different law is not material. The fact remains that it has not done so.

The fundamental questions to be here decided are whether (a) 28 U.S.C. 2255 applies to the Alaska District Court, and (b) if it apply, does it simul-

taneously deprive the Washington District Court of habeas corpus jurisdiction.

Appellant's cited cases on pages 46-50 appear to be devoted to two contentions, as follows:

(a) That territorial laws are not laws of the United States.

(b) That the Alaska District Court is not a District Court of the United States.

A careful reading of 28 U.S.C. 2255 will show clearly that if both of appellant's contentions be true, it is completely immaterial. The section of the United States Code cited speaks of prisoners under sentence "* * * of a court established by Act of Congress. * * *"

The code section does not say (as it did until 1949) "a court of the United States." Appellee concedes that under that wording some question might arise but Congress clarified the matter by the 1949 amendment (63 Stat. 105). See Footnote 1, page 682 to *U. S. ex rel Leguillou v. Davis* (C.A., 3rd; 1954) 212 F. 2d 681 quoting Senate Report 303 explaining the purpose of the 1949 amendment to "make it clear that the section is applicable in the district courts in the territories and possessions."

The sole question remaining is, whether the Alaska District Court was established by Act of Con-

gress and the answer must, of course, be affirmative. Otherwise, the court would not exist.

Having established the Alaska District Court as a "court established by Act of Congress," it necessarily follows that 28 U.S.C. 2255 applies to a prisoner under sentence of that court if his claimed grounds for relief fall within the provisions of such act. An examination of all the files and records in this case shows clearly that petitioner's claimed grievances *do* fall within the purview of the statute. It is clear, then, that such petitioner "may move" the sentencing court for relief. The next question is "must he?" and the reciprocal question also opens, to-wit: if 28 U.S.C. 2255 applies, has any other court the power to hear him?

The habeas corpus power of the United States courts is statutory. *Ex parte Bollman*, 4 Cranch. 72, 2 L.Ed. 554 (1807). Congress has expanded the rights of a petitioner for habeas corpus. *Johnson v. Zerbst*, 304 U.S. 458 at 466, 58 S.Ct. 1019, 82 L.Ed. 1089 (1937). It follows therefore that power granted or enlarged by Congress can be limited or withdrawn by Congress. The existing habeas corpus law (62 Stat. 967) was passed by Congress on June 25, 1948 and included both 28 U.S.C. 2241 *et seq*, and 28 U.S.C.

2255 here in controversy. Congress obviously intended to and did withhold from the district court power granted by 28 U.S.C. 2241, the power reserved to the sentencing court in 28 U.S.C. 2255.

Necessarily then the District Court for the Western District of Washington has no power or jurisdiction to hear the petitioner unless the remedy under 28 U.S.C. 2255 be "inadequate" or "ineffective" as contended by appellant in Argument XIV.

D. *28 U.S.C. 2255 Has Not Been Shown Inadequate or Ineffective.*

Appellant in Argument XIV (Brief, p. 51) states that habeas corpus in the Western District of Washington is available to petitioner under the law if 28 U.S.C. 2255 be inadequate or ineffective. Appellee does not quarrel with the plain wording of the statute.

Appellant states (Brief, p. 60, line 27) "Appellant has shown * * * that it [2255] is inadequate and ineffective to test the legality of his detention." With the word "shown" (as synonomous with "proved") we cannot agree. In Bouvier's Law Dictionary we find "show" defined as "to make apparent or clear by evidence, to prove" and this, rather than the meaning of "represent" or "allege" is the one which we feel must be applied.

Beginning with the cases cited by appellant in his brief on page 61, *et seq*, we find that the *Decatur*, *Hallowell*, *Owens*, *Voltz*, *Wheatley*, *Duquesne* and *King* cases are nothing more than statements that habeas corpus should not be entertained absent certain averments re 2255 required by statute. But the converse *(i.e.* that the application *must* be entertained *if* the statutory allegation be made) is by no means correct.

The *Barnes*, *Sorrento* and *Butler* cases cited go only to support the action of the District Court. The allegation of inadequacy and ineffectiveness having been made, the District Court evaluated it, found against the petitioner and, as a result, denied jurisdiction. That was all that it was required to do.

Appellant in his brief (page 66, line 25) misquotes the District Court when he says "* * * appellant's route of relief * * * was by appeal." What the District Court said (Tr. 91, line 27) was: "* * * relief must be sought before the court of appeals and not here," quite a different matter. The *Kellner* citation is not in point.

Appellant claims in concluding his brief that a writ of mandamus from this court to the Alaska court directing action, upon the 2255 petition (Brief, p. 66, line 31) would be a cumbersome procedure. This court

has used such power *U. S. v. Hall*, (C.A., 9th; 1944), 145 F. 2d 781 and there is no reason to believe that it would have failed to do so in this instance.

In treating of the factual inadequacy or ineffectiveness of 28 U.S.C. 2255 in terms of compliance with the statute, appellee feels that he cannot improve on *U. S. ex rel Leguillou v. Davis* (C.A., 3rd; 1954) 212 F. 2d 681 at 683:

> "But the remedy is not made thus 'inadequate or ineffective' by doubts about its administration in a particular case. Even if a district court should incorrectly dispose of [refuse to hear] a proper motion under Section 2255, the remedy would be by appeal [mandamus] and not any alternative habeas corpus petition. * * * Indeed, we think the * * * motion can be 'inadequate or ineffective * * *' *only if it can be shown that some limitation of scope or procedure* [italics supplied] would prevent a Section 2255 proceeding from affording * * * [relief]."

It is further interesting to note that the Third Circuit observed, "It is understandable that it may have seemed desirable to submit the issues of this petition to a judge who was a stranger to the controversy," but concluded, nevertheless, that 2255 procedure was mandatory.

E. *The Issue Is Moot.*

The court will discover from the stipulation on file herein that appellant is no longer within the West-

ern District of Washington but is incarcerated at the Federal Reformatory at El Reno, Oklahoma. That being so, it follows that this cause is moot as 28 U.S.C. 2241, the statute under which the petition was brought, authorizes the granting of the writ by "* * * the district courts and any circuit judge within their respective jurisdictions." See *U. S. ex rel Keefe v. Dulles* (C.A., Dist. Col.; 1955) 222 F. 2d 390.

There are cases which appear to hold that a transfer of petitioner will not defeat jurisdiction but a careful examination of cases cited in Petitioner's First Memorandum of Authorities, page 2, submitted to the District Court, reveals that they are clearly distinguishable.

In *Ex parte Catanzaro*, (C.A., 3rd; 1943) 138 F. 2d 100 the Third Circuit refused to dismiss a similar petition saying "There is nothing in the record to indicate that he is still not within the custody of the United States Marshal" although it has been suggested to the Court that the prisoner was confined at a penitentiary outside the District. Such is not the case here.

In *Passic v. State*, (D.C. Mich., 1951) 98 F. Supp. 1015, the District Judge cited the *Catanzaro* case and stated that the transfer of a state prisoner to a state hospital in another district of Michigan (at 1016)

"* * * cannot defeat a court's jurisdiction to grant or refuse writ on merits of application." But after so stating the District Judge cited 28 U.S.C. 1406(a) which provides for dismissal, or *transfer* to the proper district, and then dismissed the petition. Again, we must conclude that the Court was indulging in *dictum.*

The Supreme Court has examined the question in *Ex parte Endo,* 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944) from the dual standpoint of physical location of the prisoner and the amenability of her custodians to the court in question (which will be treated *infra).* After noting (at 304) that the petitioner was no longer within the District or Circuit, the Court said:

> "Moreover, there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of the appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior that if the writ issues * * * the corpus of appellant will be produced and the court's order complied with in all respects. *Thus* [italics supplied] it would seem that the case is not moot."

The appellant is clearly not within the jurisdiction of the District Court. Reversal of the District Court's decision, remand, reconsideration, and a decision to issue the writ would all be worthless as nothing would thereby be accomplished.

It is likewise clear from the stipulation on file herein that the appellant is no longer under any restraint imposed by Harold H. Hinshaw and William B. Parsons, Respondents, they being respectively the sheriff having control of the county jail where appellant was confined in the Western District of Washington and the United States Marshal for said district under whose general control he was confined. As to these two persons, the reasoning of the Supreme Court in *U. S. ex rel Innes v. Crystal*, 319 U. S. 755, 63 S.Ct. 1321, 87 L.Ed. 1694 (1942), as noted in the *Endo* opinion, *supra* (at 305) applies:

> "Only an order directed to the warden of the penitentiary could effectuate his discharge and the warden as well as the prisoner was outside the territorial jurisdiction of the District Court. We therefore held the cause moot."

Only one person named in the original proceeding, Herbert Brownell, Attorney General, exercises (through the Bureau of Prisons) any control over the prisoner. Since he was never served in this action and has not consented to the jurisdiction, manifestly no order of this or the District Court can apply to him. He is not a party to the proceeding. *Cf. Mora v. Brownell*, No. 14,454 decided by this court on December 9, 1955. The case is moot because those who were made parties to the action no longer have custody of

the prisoner; those who have custody were never made parties to the action.

Appellee further contends that any alleged prejudice of Honorable George W. Folta, District Judge, can no longer affect a 2255 proceedings. The judge in question, as appears from the stipulation on file herein, has been dead since June 6, 1955.

VIII. CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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Assistant United States Attorney